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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES A. RHODES, et al.,

Petitioners,

-vs- No. 80-332

KELLY CHAPMAN, et al.,

Respondents.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Kelly Chapman, through his attorney, respectfully moves the Court, pursuant to Rule 46 of the Rules of the United States Supreme Court, for leave to proceed in forma pauperis. Respondent is a named representative of the class of prisoners housed at the Southern Ohio Correctional Facility certified by the district court. See Chapman v. Rhodes, 434 F. Supp. 1007, 1008. Respondent did seek, and was granted, leave to proceed in forma pauperis in the district court, see 434 F. Supp. at 1008, and continued to proceed in forma pauperis in the Sixth Circuit Court of Appeals pursuant to Rule 24 of the Federal Rules of Appellate Procedure.

For the foregoing reasons, respondent respectfully requests that his motion be allowed.

Respectfully submitted,

Jean P. Kamp
Counsel for Respondent
40 West Gay Street
Columbus, Ohio 43215
(614) 224-8374

IN THE SUPREME COURT OF THE UNITED STATES

KELLY CHAPMAN, et al.,

Plaintiffs,

-v-

Case No. _____

JAMES A. RHODES, et al.,

Defendants.

AFFIDAVIT

STATE OF
COUNTY OF SS

I, Kelly Chapman, being first duly sworn, depose and say that I am a representative plaintiff in the above-entitled case; and that in support of my motion to proceed in this Court without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of defending the appeal are true.

1. Are you presently employed? No.

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. I have never worked

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   No.

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No.

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Kelly Chapman
Kelly Chapman

SUBSCRIBED AND SWORN TO before me this 23 day of Sept., 1980.

Paul N. Adams
NOTARY PUBLIC PAUL N. ADAMS
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES MAY 23, 1983

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Motion for Leave to Proceed In Forma Pauperis have been served upon the petitioners, James A. Rhodes, Governor of the State of Ohio, George F. Denton, Director of the Department of Rehabilitation and Correction, and Ronald G. Marshall, Superintendent of the Southern Ohio Correctional Facility, by forwarding such copies through the office of their counsel, William J. Brown, Attorney General, and Allen P. Adler and Leo J. Conway, Assistant Attorney Generals, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, by United States mail, first class postage prepaid, this 26th day of September, 1980. I further certify that all parties required to be served have been so served.

Louis A. Jacobs

Louis A. Jacobs

IN THE SUPREME COURT OF THE UNITED STATES

JAMES A. RHODES, et al.,

Petitioners,

-vs-

Case No. 80-332

KELLY CHAPMAN, et al.,

Respondents.

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN SS

I, Louis A. Jacobs, being duly cautioned and sworn, depose and say:

1. I am counsel of record for the respondents in the above captioned case.

2. I am a member of the Bar of this Court.

3. This affidavit is prepared pursuant to Rule 28.2, Rules of the United States Supreme Court.

4. I personally mailed an original and one copy of the Brief in Opposition to Petition for Certiorari with accompanying documents to Mr. Michael Rodak, Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C. 20543, first class postage prepaid, on September 26, 1980.

Louis A. Jacobs

Louis A. Jacobs

Sworn to before me and subscribed in my presence this 26th day of September, 1980.

Barbara Allen Baumbusch

Barbara Allen Baumbusch, Notary Public
Franklin County, State of Ohio
My Commission Expires July 9, 1981

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SUPREME COURT, U.S.

CASE NO. 80-332

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

JAMES A. RHODES, et al.

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR RESPONDENTS

QUESTION PRESENTED

WHETHER THIS COURT SHOULD DISTURB THE FINDING OF THE TRIAL COURT THAT OVERCROWDING, AND CONSEQUENT DOUBLE CELLING, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE TOTALITY OF CIRCUMSTANCES EXISTING AT THE SOUTHERN OHIO CORRECTIONAL FACILITY.

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STATEMENT OF THE CASE

This case involves an evaluation by the trial court, based upon testimony, documentary evidence, and a tour of the prison that "the totality of circumstances of the particular case" (A-31) of the Southern Ohio Correctional Facility constitutes cruel and unusual punishment. Petitioners mischaracterize the trial court's ruling as a decision predicated on a per se rule prohibiting double celling.

The trial court explicitly rejected that approach: "[W]e certainly are not concluding that all double celling in any 60 square foot cell is beyond the ambit." A-37. The appellate court agreed, "We do not read the opinion as holding that double celling is unconstitutional under all circumstances." (A-2) and properly described the trial court's decision: "The district court listed in its opinion a number of considerations upon which it based its finding that double celling at the particular prison in question is unconstitutional." A-2.

After the district court decision, petitioners sought relief from judgment in light of Bell v. Wolfish, 441 U.S. 520 (1979). In an Order not supplied with the petition for certiorari, but attached hereto as Respondent's Appendix, the district court found Wolfish was inappropriate and emphasized the "totality of circumstances" standard at bar. See Respondents' Appendix, p. 3, n. 2.

The remedy for the unconstitutional conditions which was ordered by the trial judge was a population reduction to 1645, the approximate rated capacity of the institution of 1620, plus 25, the number expected to be absent from the institution at any given time. (Stipulation and Entry, August 25, 1978, attached as Respondents' Appendix, p. 4.) Double celling was not by itself enjoined; indeed, the order allows double celling since the 1620 cells include cellblocks housing prisoners accused of disciplinary violations, those in protective custody, and those on death row, blocks whose cells are seldom in full use. Double celling exists today at the prison.

ARGUMENT

Both courts below decided the constitutional issue in this case by using a totality of circumstances standard. This Court has already approved that standard. In Hutto v. Finney, 437 U.S. 678, 685-86 (1978), the Court rejected an argument similar to that made by the petitioner here and held that, while solitary confinement for more than thirty days was not per se unconstitutional, it was properly enjoined under the totality of circumstances presented by the case. As part of the basis for that decision, the Court stated:

> Finally, the exercise of discretion in this case is entitled to special deference because of the trial judge's years of experience with the problems at hand and his recognition of the limits on a federal court's authority in a case of this kind.
> 437 U.S. at 688.

In Bell v. Wolfish, 441 U.S. 520, 543 (1979), this Court confirmed that the totality of circumstances must be considered by citing Hutto, supra, for its holding that the short length of stay of detainees at the Metropolitan Correctional Center was one factor to be considered in the finding that no constitutional violation had been shown. The Wolfish Court clearly rejected any per se standard when considering double celling:

> While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.
> 441 U.S. at 542 (footnote omitted).

This case thus presents no novel issue and represents an attempt by the petitioner to gain a second appeal.

No conflict exists among the circuits with respect to the proper standard to be used in cases challenging conditions in prisons and jails. The petitioners

argue that certain decisions in the Second, Fourth, Fifth, and Eighth Circuits have held that double celling is not under all circumstances unconstitutional. This is, of course, true. As Judge Hogan pointed out in this case:

> Since the 'totality' of the circumstances differs from case to case, it is difficult to find 'controlling' authority. A-31.

In cases decided both before and after the decision in Wolfish, the Courts of Appeal have refused to establish a per se rule either allowing or prohibiting double celling.

The petitioners ask the Court to approve a "test" stated in Hite v. Leeke, 564 F.2d 670, 673-74 (4th Cir. 1977). However, that decision did not authorize double celling in a case where the totality of conditions violated the Eighth Amendment. The same court, sitting en banc, has recently held in Johnson v. Levine, 588 F.2d 1378, 1380 (4th Cir. 1978):

> In Hite v. Leeke, . . . we held that "double-celling", the housing of two prisoners in a cell initially designed for single occupancy, was not itself a violation of the Constitution. It, of course, may be a relevant factor when other consequences of overcrowding create deprivations or impose unusual restrictions and disadvantages upon the prison population.

Similarly in Burks v. Teasdale, 603 F.2d 59, 63 (8th Cir. 1979), the court affirmed findings that double celling was constitutional in some parts of the Missouri State Penitentiary and unconstitutional in others:

> We are concerned with the action of the district court in permitting double-celling to continue permanently or indefinitely in Housing Unit 3. We do not hold categorically that putting two men in a cell with a floor space no larger than 65 square feet either is or is not constitutionally permissible. We think that a good deal may depend on the type of institution involved, the nature of the inmates, and the nature of the confinement itself. Cf. Bell v. Wolfish, supra.

The Fifth Circuit also has recently reaffirmed the totality of conditions test. In Smith v. Sullivan, 611 F.2d 1039, (5th Cir. 1980), Judge Frank Johnson,

speaking for the court, reversed an order that limited population in a city jail to 500 persons because the trial court had not first held a hearing as to overall conditions in the jail:

> It need not be repeated that federal courts should intervene in the day-to-day operations of state and local penal and detention systems only with the greatest of reluctance. . . . Where constitutional deprivations are established, either in specific instances, ... or by the totality of conditions within an institution, the federal courts may, and must, if the issue is appropriately presented, intervene. . . . As indicated above, the federal courts have the power, and the duty, to make their intervention effective. To prevent further constitutional deprivations, a court may order forms of relief not normally required by the Consitution but nevertheless necessary given the circumstances if the court's efforts are to be successful.
> 611 F.2d at 1044 (citations omitted).

The case was remanded to the district court for a hearing on the totality of conditions existing at the jail.

Respondents respectfully submit that there is no conflict between the decision of the Sixth Circuit in this case and the decisions regarding overcrowding and double celling in other circuits. Some courts have allowed double celling while others have prohibited it because of the nature of the totality of the circumstances test: the test employed by both courts in this case and approved in Bell v. Wolfish, Hutto v. Finney, and the Courts of Appeals for the Fourth, Fifth and Eighth Circuits.

The petitioners are asking this court to adopt the very rule rejected in Wolfish, and to adopt a per se approach in dealing with overcrowding as one of the conditions of confinements in particular penal institutions. The State of Ohio is asking the Court to authorize the continued and increasing overcrowding of its prison facilities.

Despite the finding of the trial court that the totality of conditions at the Southern Ohio Correctional Facility constitutes cruel and unusual punishment

and despite the holding of the Sixth Circuit that those findings were not clearly erroneous, the petitioners ask this Court to prevent the district court from ordering population reduction as the remedy for the constitutional violations found. It is respectfully urged that the constitutional problems created by overcrowding and double celling in the state penitentiaries are best handled as they are at present under the law set forth in Hutto and Wolfish, on a case by case basis. This test of totality of circumstances, which is being consistently applied by the lower courts as it was in this case, is the proper test and need not be reconsidered by the Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Response to Petition for Writ of Certiorari have been served upon the petitioners, James A. Rhodes, Governor of the State of Ohio, George F. Denton, Director of the Department of Rehabilitation and Correction, and Ronald G. Marshall, Superintendent of the Southern Ohio Correctional Facility, by forwarding such copies through the office of their counsel, William J. Brown, Attorney General, and Allen P. Adler and Leo J. Conway, Assistant Attorney Generals, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, by United States mail, first class postage prepaid, this 26th day of September, 1980. I further certify that all parties required to be served have been so served.

Louis A. Jacobs

APPENDIX

Page

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT AND STAY OF EXECUTION August 14, 1979..... A-2

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FILED
JOHN D. LYTER, CLERK
AUG 14 2 57 PM '79
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WEST DIV. CINCINNATI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,)
Plaintiffs)
v.)
JAMES A RHODES, et al.,)
Defendants)

NO. C-1-75-251

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT AND STAY OF EXECUTION

Defendants to this case move for relief from the judgment of this Court, entered April 7, 1978 (doc. 211), and for a stay of the execution of the judgment pending the ultimate disposition of the case (doc. 258). Defendants' motion has been opposed (doc. 259), and is now submitted for the Court's consideration.

Pursuant to Federal Rule of Civil Procedure 60(b) [1/] defendants move for relief from judgment on the ground that the judgment of this Court is in conflict with the recent decision of the Supreme Court of the United States in Bell v. Wolfish, 47 U.S.L.W. 4507 (U.S. May 14, 1979). We do not agree that the judgment is in conflict with Wolfish. The Supreme Court in Wolfish was not unaware of

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1/ Defendants do not indicate pursuant to which subsection of Rule 60(b) their motion is made, but we presume that it has been made pursuant to subsection (5) and/or (6). See generally C. Wright & A. Miller, Federal Practice and Procedure §§ 2863, 2864 (1973).

this Court's decision in this case. In a footnote to the majority opinion, Mr. Justice Rehnquist wrote:

> Respondents' reliance on other lower court decisions concerning minimum space requirements for different institutions and on correctional standards issued by various groups is misplaced. Brief for Respondents 41, and nn. 40 and 41; see, e.g., Campbell v. Magruder, supra; Battle v. Anderson, 564 F.2d 388 (CA 10 1977); Chapman v. Rhodes, 434 F.Supp. 1007 (S.D. Ohio 1977); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (Mass. 1973).... The cases cited by respondents concerned facilities markedly different from the MCC. They involved traditional jails and cells in which inmates were locked during most of the day. Given this factual disparity, they have little or no application to the case at hand. Thus, we need not and do not decide whether we agree with the reasoning and conclusions of these cases.

47 U.S.L.W. at 4513 n. 27 (emphasis added). 2/ Given this treatment of our decision by the Court, we think that Wolfish provides no basis for granting defendants relief from the judgment of this Court entered on April 7, 1978. Defendants' motion, insofar as it seeks relief from judgment, is denied.

Defendants again seek a stay of the execution of the Court's April 7, 1978 judgment. By an Order dated May 8, 1978 (doc. 220) we denied a similar request by defendants. For substantially the same reasons discussed

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2/ In his dissenting opinion, Mr. Justice Marshall cites our decision to support the proposition, "Other courts have found that in the circumstances before them overcrowding inflicted mental and physical damage on inmates." 47 U.S.L.W. at 4521 n. 11 (emphasis added).

in that Order, defendants' present request is not well taken, and defendants' motion, insofar as it seeks a stay of the execution of the judgment of this Court entered on April 7, 1978, is denied.

Finally, there exists some uncertainty in this Court's mind whether it possesses jurisdiction not only to indicate that it is willing to consider defendants' motion, insofar as it is made pursuant to Rule 60(b), 3/ but also to dispose of that motion without a remand of the case from the United States Court of Appeals for the Sixth Circuit, where it is now pending (No. 78-3365). In First National Bank v. Hirsch, 535 F.2d 343 (6th Cir. 1976), the Sixth Circuit sought to outline the proper procedure which a party should follow when it seeks to make a Rule 60(b) motion after a notice of appeal has been filed. Although the Court noted that the "[f]iling of a notice of appeal operates to transfer jurisdiction of the case to the court of appeals, and the district court is thereafter without jurisdiction except to act in aid of the appeal," 535 F.2d at 345 n. 1 (citations omitted), the Court set forth the proper procedure as follows:

> [W]e think that the party seeking to file a Rule 60(b) motion....should have filed that motion in the district court. If the district

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3/ We do not think that there is any question that this Court possesses jurisdiction to consider defendants' motion, insofar as it concerns a stay of execution. See Fed. R. App. P. 8(a); Fed. R. Civ. P. 62(c).

> is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court.

Id. at 346 (emphasis added); accord, United States v. Phillips, 558 F.2d 363 (6th Cir. 1977). The inference from this language in First National Bank v. Hirsch is, we think, that the Court possesses jurisdiction not only to indicate its willingness to consider defendants' motion, insofar as it is made pursuant to Rule 60(b), but also to dispose of that motion, particularly since the Court chooses to deny it. See Ferrell v. Trailmobile, Inc., 223 F.2d 697, 699 (5th Cir. 1955); Schattman v. Texas Employment Commission, 350 F.Supp. 328, 330 (W.D. Tex. 1971), rev'd on other grounds, 459 F.2d 32 (5th Cir. 1972); C. Wright & A. Miller, supra note 1, § 2873, at 265. If, however, this Court is without jurisdiction to dispose of defendants' motions, this Order serves to indicate, respectfully, to the Court of Appeals this Court's willingness to consider defendants' motion and the disposition which we would make. Cf. New Jersey Life Insurance Co. v. Getz, No. C-1-75-254, slip op. at 3 n. 1 (S.D. Ohio July 3, 1979) (doc. 51) (indicating Court's uncertainty concerning whether it possessed jurisdiction to dispose of Rule 60(b) motion).

SO ORDERED.

United States District Judge

JOHN D. LYTER, CLERK
AUG 25 1 38 PM '78
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
WEST DIV. CINCINNATI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,

Plaintiffs,

-vs-

JAMES A. RHODES, et al.,

Defendants.

Case No. C-1-75-251

J. HOGAN

Indexed
Docketed ✓
Journal ✓
Motion
Issue counsel
Card

STIPULATION AND ENTRY

It is hereby stipulated and agreed between counsel for the parties, based upon the representations made to the Court in the chambers conference on August 22, 1978, that the Court's Judgment entered on April 7, 1978, shall be construed as follows:

1. "Assigned population" as used in Paragraphs 2 and 4 of the Judgment means total population including in-house, absent with leave, and absent without leave.

2. "Thirty days" as used in Paragraphs 2 and 4 of the Judgment means calendar month.

3. On or before August 31, 1978, the defendants shall reduce the assigned population of S.O.C.F. to 1,896 (one thousand eight hundred ninety six), which is twenty-five persons less than the actual assigned population on July 30, 1978, and shall reduce the assigned population by twenty-five persons every calendar month thereafter.

4. "Single cell capacity" as used in Paragraph 2 of the Judgment means 1,645 (one thousand six hundred forty five) which shall be the maximum permissible assigned population after compliance with Paragraph 2 of the Judgment. This figure of 1,645 (one thousand six hundred forty five) is derived from the 1,620 (one thousand six hundred twenty) single residential cells at S.O.C.F. plus twenty-five, the approximate number of persons absent with leave at any given time.

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5. It is further stipulated and agreed between counsel for the parties that Plaintiffs' Motions for a Rule to Show Cause and their requests for discovery are withdrawn; that Defendants' Motion for a Protective Order is withdrawn; and that Defendants shall provide the reports described in Paragraph 4 of the Judgment to counsel for the Plaintiffs on Monday of each of the four weeks following the date of this stipulation, such report to reflect the population at S.O.C.F. for the preceding Friday; at the end of that four week period, reports shall be submitted as provided by Paragraph 4 of the Judgment.

6. Counsel for the Defendants shall provide a copy of this stipulation to each of the defendants in this action.

8/24/78
Date

U.S. District Judge

8-23-78
Date

William J. Brown, Attorney General
by Allen P. Adler, Assistant
Attorney General
Attorney for all Defendants

Aug 23, 1978
Date

Robert P. App
Attorney for Plaintiffs